STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

BRUCE B. FEYZ, M.D., an individual,

Plaintiff-Appellee,

v.

MERCY MEMORIAL HOSPITAL, MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.

Defendants-Appellants,

Supreme Court No. ~~126886~~ 128059

Court of Appeals No. 246259

Monroe Circuit No. 02-14174-CZ

/

AMICUS CURIAE BRIEF OF THE MICHIGAN OSTEOPATHIC ASSOCIATION

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STATEMENT OF THE QUESTIONS PRESENTED

I. SHOULD MICHIGAN LAW RECOGNIZE THE JUDICIALLY-CREATED NON-REVIEWABILITY DOCTRINE AS A SEPARATE GROUND OF IMMUNITY APART FROM THE STATUTORY PROTECTIONS SET FORTH IN MCL 331.531?

The trial court answered "yes."

The Court of Appeals answered "no."

Defendants answer "yes."

Plaintiff answers "no."

Amicus Curiae Michigan Osteopathic Association answers "no."

II. DOES MCL 331.531 SHIELD HOSPITAL REVIEW ENTITIES FROM LIABILITY FOR ALLEGED VIOLATIONS OF CIVIL RIGHTS STATUTES?

The trial court did not adopt a per se rule, but instead ruled in favor of Defendant on the specific facts of this case because Plaintiffs failed to present clear and convincing proof of malice.

The Court of Appeals answered, as a per se rule, that violations of civil rights statutes are always outside of the scope of the review entity's function and necessarily involve malice, which is an exception to the protection afforded by MCL 331.531.

Defendants answer that violations of civil rights statutes may be within the scope of a review entity's function and do not necessarily involve malice.

Plaintiff answers that the Court of Appeals holding is correct that violations of civil rights statutes are outside of the scope of the review entity's function and necessarily involve malice.

Amicus Curiae Michigan Osteopathic Association agrees with Court of Appeals..

III. DOES MCL 331.531 SHIELD REVIEW ENTITIES FROM LIABILITY FOR ALLEGED VIOLATIONS OF HOSPITAL BYLAWS?

The trial court indirectly answered "yes" by relying on the non-reviewability doctrine.

The Court of Appeals answered "no."

Defendants indirectly answer "yes" by relying on the non-reviewability doctrine.

Plaintiff answers "no."

Amicus Curiae Michigan Osteopathic Association answers that violations of bylaws that provide for procedural due process rights are necessarily outside of the scope of the peer-review entity's function and therefore not covered by the statutory immunity offered by MCL 331.531.

IV. DID DEFENDANTS QUALIFY AS PEER REVIEW ENTITIES UNDER MCL 331.531?

The trial court answered "yes."

The Court of Appeals did not address the substantive question with respect to the Medical Staff Executive Committee, but instead concluded that Defendants had failed to argue the issue on appeal.

Defendants answer "yes."

Plaintiff answers "no."

Amicus Curiae Michigan Osteopathic Association answers "yes."

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is filed pursuant to the invitation for the participation of the Michigan Osteopathic Association (the "MOA") set forth in the order granting Defendants' Application For Leave To Appeal.

The MOA is a Michigan nonprofit corporation formed in 1898 as a divisional society of the American Osteopathic Association. The MOA is one of the largest osteopathic state organizations and represents over 5,000 osteopathic physicians and students in Michigan. The MOA was instrumental in the founding of Michigan State University College of Osteopathic Medicine, the first publicly supported osteopathic institution in the country. Michigan is second only to Pennsylvania in the number of actively practicing osteopathic physicians.

This appeal presents an issue of significant concern to members of the MOA because peer review plays a vital role in the operation of hospitals and the protection of public health. Hospital staff privileges are absolutely essential to a physician's career. Nearly all health insurance companies require primary care physicians to be able to admit and care for their patients at a hospital and, of course, to physician specialists and surgeons, a hospital is an essential facility. If hospital medical staff decisions are not subject to a minimum level of legal review, then the hospital (and, in some cases, the physician's competitors who may control the medical staff credentialing process) can have excessive and arbitrary powers over a physician's ability to provide care in the community. For example, there are cases known to the MOA where osteopathic physicians have been discriminated against on the basis of their osteopathic status in violation of state law prohibiting such discrimination. Where discrimination is in violation of special civil rights protections, the MOA believes that a remedy is warranted.

On the other hand, it is important to encourage legitimate peer review to ensure the competency of physicians on hospital medical credentialing committees. The MOA supports protection of physicians on hospital peer review committees who carry out these duties in good faith.[1]

STATEMENT OF FACTS

The MOA is concerned only with the broader legal principles at stake in this case and has no specific issue with the statements of facts made by either party.

STATEMENT OF POSITION & SUMMARY OF ARGUMENT

By adopting MCL 331.531, the Michigan Legislature has established a statutory scheme to protect hospitals from liability arising from staffing decisions made by review entities. The statute is broad. It protects persons, organizations, and entities, from both criminal and civil liability for acts within in the scope of the person's, organization's, and entity's review function, except in cases where the person, organization, or entity has acted with malice. The MOA contends that this statutory scheme, alone, should control whether a hospital is immune from civil liability for actions relating to its staffing decisions.

Apart from the specific statutory protections afforded by MCL 331.531, private hospitals should not have special license to violate laws that are otherwise applicable to private persons and organizations. By the same token, private hospitals should not be

[1] Hospitals should, and most hospitals do, encourage physicians to serve on peer review committees by obtaining adequate insurance coverage and adopting appropriate indemnification provisions. Non-profit hospitals (which constitute the vast majority of private hospitals) can provide additional protection to the members of peer review committees by adopting provisions in their articles of incorporation assuming liability for individual peer review committee members. See MCL 450.2209(e). Moreover, individual committee members are afforded additional immunity protection under MCL 333.16244.

subjected to a more stringent type of judicial review. Michigan legal jurisprudence has lost sight of these common sense principles. The initial ruling made by the Court of Appeals in *Hoffman v Garden City Hospital*, 115 Mich App 773; 321 NW2d 810 (1982), that private hospitals should be free of special judicial *scrutiny*, has, through repeated misinterpretation and unintended expansion, gradually transformed into rule of special judicial *immunity* for hospitals, see, e.g., *Sarin v Samaratin Health Center*, 176 Mich App 790; 440 NW2d 80 (1989). The MOA agrees with the Court of Appeals decision in the present case to pull back from the expansive view of non-reviewability. Analysis of the historical roots of the non-reviewability doctrine reveals that it "does not create any greater insulation from scrutiny than that enjoyed by any other private employer." *Feyz v Mercy Memorial Hosp*, 264 Mich App 699, 710; 692 NW2d 416 (2005).

The MOA urges this Court to abandon the judge-made non-reviewability doctrine in favor a policy of strict adherence to the statutory rule of immunity set forth in MCL 331.531. In enacting MCL 331.531, the Legislature weighed the relevant substantive policy considerations and established an appropriate scheme of protection for private hospitals making staffing decisions. To the extent that the judge-made non-reviewability doctrine is deemed to provide special immunities to hospitals that are (1) not extended to other private employers and (2) not set forth in MCL 331.531, the application of the doctrine constitutes an improper usurpation of legislative authority.

In short, the MOA agrees with the conclusion of the Court of Appeals in *Hoffman*, *supra*, that private hospitals should not be subject to any more intrusive judicial review than other private employers. The MOA also agrees with the Court of Appeals' conclusion in *Long v Chelsea Community Hosp*, 219 Mich App 578; 557 NW2d 157

(1996), that MCL 331.531 does not create a special right of action for staffing decisions made with malice. But the MOA disagrees with the expansion of the *Hoffman* rule, employed in cases such as *Sarin*, *supra*, pursuant to which hospitals have been give special protection from legal doctrines otherwise applicable to private employers. To the extent hospitals are entitled to special protection for policy reasons, it is the job of the Legislature to make the policy determinations. The statutory immunity provision set forth in MCL 331.531 provides hospitals with immunity from civil liability in certain, specified circumstances. Where a right of action exists under the law, the plaintiff's claim should be allowed to proceed subject to the specific limitations of MCL 331.531.

The protections afforded to hospitals by MCL 331.531 do not extend to acts of malice. Violations of statutory civil rights laws necessarily involve malice by the violator. This is so because illegal discrimination necessarily requires an intention to discriminate against the plaintiff on the basis of a protected classification. Accordingly, MCL 331.531 does not provide immunity from violations of civil rights laws—one of which is specifically designed to protect osteopathic physicians from discrimination by hospitals, see MCL 333.21513(e).

Further, the MOA urges that hospitals are not immune from violations of their own bylaw provisions establishing procedural due process rights in peer review matters. Although the Court of Appeals did not rule whether a violation of hospital bylaws gives rise to a legal cause of action, the MOA urges that it is not within the scope of peer review entity activity for a hospital to violate its own bylaw mandated procedures for fair hearings in medical staff decisions. Fair hearing provisions in hospital bylaws are , in many cases, the only arsenal against arbitrary and capricious medical staffing decisions.

Moreover, courts are especially well suited to address issues regarding these kinds of bylaw violations as they involve questions, not of medical competency, but of procedural due process.

Finally, the MOA agrees with Defendants' argument III that all Defendants were acting as review entities as defined by MCL 331.531.

ARGUMENT

A. *Three Important Court of Appeals Decisions*

The development of the judge-made non-reviewability doctrine in Michigan is revealed by consideration of three Court of Appeals cases that have been the subject of much discussion in this litigation. A careful analysis of these decisions, as undertaken by the Court of Appeals in this case, is necessary to understand the role played by the non-reviewability doctrine in Michigan.

1. Hoffman v Garden City Hospital

The issue in *Hoffman, supra*, was whether a private hospital holds a special fiduciary obligation, derived from its effect on the public interest, to exercise staff decisions reasonably and for the public good. See *id.* at 777. After reviewing a number of foreign cases addressing the issue, the Court of Appeals wisely held that the decisions of private hospitals are not subject to *special* judicial scrutiny and that they should be treated in the same manner as other private employers. *Id.* at 777-779. Nothing in *Hoffman* stands for the proposition that private hospitals are specially immune from the operation of laws generally applicable to all private employers. Accordingly, the MOA agrees with and endorses the *Hoffman* decision.

Dissenting from the Court of Appeals decision in the instant case, Judge Murray posited that *Hoffman* was based, at least in part, on the Court of Appeals *policy choice*

that court's should refrain from intervening in an area in which judges and juries lack expertise. See *Feyz, supra* at 731. To the extent that this policy decision merely bolstered the Court of Appeals decision not to create special rules for reviewing the staffing decisions of private hospitals—which was the only issue actually before the *Hoffman* Court—the MOA agrees. The judiciary's lack of expertise in questions of medical competency is one more good reason for courts not to create special rules to govern hospital staffing decisions. But it does not provide a sound reason for court's to refuse to apply the *existing* law to private hospitals in the same way that courts regularly apply the law to all other private employers.

2. Sarin v Samaratin Health Center

In the cases that followed *Hoffman*, subsequent Court of Appeals panels failed to notice the distinction between (1) *not* creating special rules that would restrict private hospital staffing decisions and (2) *creating* special protections to insulate private hospital staffing decisions from judicial scrutiny The most notable is example may be the *Sarin* case. The *Sarin* case—unlike *Hoffman*—did not involve a plaintiff seeking to enforce some novel cause of action against a private hospital. Instead, the plaintiff sought a remedy for breach of contract and tortious interference with a contract—two long-established legal doctrines. Relying on the *Hoffman* court's decision not to recognize a special *new* cause of action against private hospitals, the *Sarin* court held that consideration of a breach of contract claim "would necessarily involve a review of the decision to terminate and the methods or reasons behind that decision, thus making a mockery of the rule that *prohibits judicial review* of such decisions by private hospitals." *Id.* at 794. In this manner, the *Sarin* decision (and other similar Court of Appeals

decisions) greatly expanded the *Hoffman* rule and turned it into a judge-made rule of immunity from judicial review.[2] The *Sarin* Court (and others like it) made this substantial jump from *Hoffman* without articulating any basis in law for so doing.

3. Long v Chelsea Community Hospital

The issue in *Long* was whether the malice exception to MCL 331.531 itself created a private right of action upon which to sue based on a staffing decision allegedly made with malice. The Court of Appeals panel (including now Justice Corrigan and Justice Young) held that the malice exception to MCL 331.531 did not itself create a private right of action. *Long, supra* at 58-584. The MOA agrees with this aspect of the decision in *Long.* The statutory language is plain. MCL 331.531 merely provides immunity from civil and criminal liability except in cases of malice. The role of malice is to remove statutory immunity. A plaintiff seeking to sue a hospital for a staffing decision still must have a viable legal theory independent of MCL 331.531 in order to obtain relief.

After addressing the statute, the *Long* Court proceeded to hold that the non-reviewability doctrine precluded judicial review of "contractual disputes" arising out of private hospital staffing decisions. *Id.* at 586. The *Long* Court reached this decision based on a straightforward application of precedent, namely the *Sarin* case. See *Long, supra* at 586-588. Citing to *Sarin*, the *Long* Court explained that "[a] breach of contract and breach of bylaws claim would necessarily invoke a review of the hospital's decision to terminate its employees," which the *Sarin* court had determined would "interfere with

[2] In *Bhogaonker v Metropolitan Hospital*, 164 Mich App 563, 566; 417 NW2d 501 (1987), the Court of Appeals went so far as to hold that courts lacked subject matter jurisdiction to review claims arising from private hospital staffing decisions. See also *Sarin, supra* at 795.

the peer review process." *Long, supra* at 588. In effect, the *Long* Court faithfully applied a policy choice made by the *Sarin* Court, based on the *Sarin* Court's misapplication of the *Hoffman* rule. The Michigan Supreme Court is not similarly bound by prior Court of Appeals precedent and has a duty to re-examine whether the policy choices made by the Court of Appeals are an acceptable use of the judicial power.

B. *Statutory Immunity for Hospital Staffing Decisions*

Separate and apart from the judge-made rule of non-liability described in *Sarin, supra*, and *Long, supra*, the Michigan Legislature has enacted a statutory scheme of immunity designed to protect hospitals from liability associated with staffing decisions involving review entities. The key statute, MCL 331.531, provides, in pertinent part, as follows:

> (1) A person, organization, or entity may provide to a review entity information or data relating to the physical or psychological condition of a person, the necessity, appropriateness, or quality of health care rendered to a person, or the qualifications, competence, or performance of a health care provider.
>
> (2) As used in this section, "review entity" means 1 of the following:
>
> (a) A duly appointed peer review committee of 1 of the following:
>
> * * *
>
> (iii) A health facility or agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.
>
> * * *
>
> (3) A person, organization, or entity is not civilly or criminally liable:
>
> (a) For providing information or data pursuant to subsection (1).
>
> (b) For an act or communication within its scope as a review entity.
>
> (c) For releasing or publishing a record of the proceedings, or of the reports, findings, or conclusions of a review entity, subject to sections 2 and 3.

(4) The immunity from liability provided under subsection (3) does not apply to a person, organization, or entity that acts with malice.

* * *

Under this statute, if a hospital makes its staffing decisions by using a review entity (as defined above), it is immune from civil and criminal liability provided that (i) the claim involves an act within the scope of the review entity's function, and (ii) the defendant did not act with malice. Considered in its entirety, MCL 331.531 (along with the related provisions MCL 331.532 and MCL 331.533) constitutes a comprehensive scheme of regulation governing hospital peer review practices and immunities.

C. *The Judge-Made Non-Reviewability Doctrine as a Usurpation of Legislative Authority*

Since the legislature has enacted legislation establishing a broad rule of immunity, it is clear that the proper role of the judiciary is to apply the statutory law and *not* to divine its own, even broader, rule of non-reviewability.

1. The Non-Reviewability Rule Urged by Defendant is a Judge-Made, Policy-Based Rule.

As is abundantly clear from a review of (1) Defendants' brief, (2) the *Sarin* opinion, and (3) Judge Murray's Court of Appeals dissent, the *only* rationale for the non-reviewability rule is a judge-made, public policy determination that courts may not adjudicate the merits of contract claims arising out of private hospital staffing decisions, because such judicial review would impair the hospital's ability conduct an effective peer review. See Defendant's brief, pp 16, 20-21, 26-27; *Sarin, supra* at 795; *Feyz, supra* at 729-734 (Murray, J., dissenting). We must presume that the Michigan Legislature weighed similar policy considerations when it enacted MCL 331.531. To the extent that the court's substantive policy determinations conflict with the legislature's substantive

policy determinations, the legislature's policy determinations should control, because the legislative branch of government is the only branch of government that is empowered, and properly equipped, to weigh conflicting policies and enact substantive law. See, e.g., *Henry v Dow*, 473 Mich 63, 92 & n 24; 701 NW2d 684 (2005). Put bluntly, this Court is not free to replace legislative policy determinations with its own policy determinations regarding the same subject matter. See, e.g., *Calovecchi v Michigan State Police*, 461 Mich 616, 611 NW2d 300 (2000) (explaining that the Court's duty is to construe the controlling statute, not to reach a "preferable" policy result).

Apart from the stated policy-based rationale of the non-reviewability doctrine, its status as a judge-made, policy-based rule of substantive law is further demonstrated by its function as a special rule of immunity applicable only to private hospitals (and not to other employers). No valid extrajudicial source has been identified as a basis for the notion that the law of contracts (and, in some cases, the law of torts) should not apply equally private hospitals in the same manner these doctrines govern the conduct of other private actors. Nor is there anything in particular about contract law or tort law that would except private hospitals from the generally applicable rules of those doctrines. Accordingly, apart from the statutory provisions set forth in MCL 331.531, there is no valid legal basis for courts to afford special immunities to private hospitals.

2. This Court's Recent Decisions Demonstrate a Keen Awareness of the Proper Role of Courts within the Separation of Powers

In recent years, many of this Court's decisions have emphasized the importance of the separation of powers and of courts being cognizant of the inherent limitations on judicial authority and the proper role of the legislature as the only valid source of

substantive policy determinations. This is especially true where the legislature has made positive enactments addressing the same subject matter.

In *Devillers v Auto Club Ass'n*, 473 Mich 562; 702 NW2d 539 (2005), this Court rejected the court-created "judicial tolling doctrine," which had provided that the "one-year back" limitation set forth in MCL 500.3145(1) for the recovery of no-fault personal protection insurance benefits was to be tolled during the time between the insured's claim and the formal denial. This Court reasoned that, because the judicial tolling doctrine was inconsistent with the legislative expression of intent on the same subject matter, continued adherence to the judge-made doctrine would amount to an unconstitutional usurpation of legislative authority by the judiciary. *Id.* at 593. In the same manner, this Court's continued adherence to the judge-made non-reviewability doctrine in the face of the specific immunity provisions crafted by the legislature in MCL 331.531 would also constitute an improper judicial usurpation of legislative authority.

In *People v Carpenter*, 464 Mich 223; 667 NW2d 276 (2001), this Court rejected the judge-made diminished capacity defense to criminal liability because the Legislature "enacted a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation" and the legislative scheme did not include a diminished capacity defense. *Carpenter, supra* at 241. The present case involves a similar circumstance. MCL 331.531 is analogous to the comprehensive statutory scheme regulating the insanity defense in *Carpenter*. In the face of a comprehensive legislative scheme, there is no room for additional judge-made law addressing the same general subject matter.

Finally, in *Henry v Dow, supra*, this Court rejected the plaintiffs' requests for the recognition of a medical monitoring cause of action, in part, because the plaintiffs claimed damages arising from exposure to dioxins and the Legislature had "already provided a method for dealing with the negligent emission of toxic substances" by empowering the Michigan Department of Environmental Quality with the authority to coordinate the response to toxic pollution. See *Henry*, *supra* at 93.

These cases aptly demonstrate the principle that the judiciary should not attempt to flex its policy-making muscle in the face of a statutory scheme addressing the same subject matter. Recognizing the judge-made non-reviewability doctrine in the face of MCL 331.531 would do exactly this. In order to advance the legislature's determination of the proper public policy with respect to immunity for peer review, this Court should hold that the governing rules are those set forth by statute and *only* those set forth by statute.

D. *Violation of Civil Rights Statutes as Malice Per Se*

Assuming that MCL 331.531 is the sole authority for providing immunity to private hospitals, the key exception to the statute is for acts of "malice." The MOA agrees with the conclusion of the Court of Appeals majority that a violation of a civil rights statue is malice per se because it requires proof of an intention to discriminate.

In all legal contexts, from murder to defamation, the word "malice," as a legal term encompasses two general states of mind, i.e., two separate tests of *mens rea.* The first mental state that constitutes "malice" is the intention to commit a wrongful act. See *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997) (including within the definition of "malice," for purposes of murder, the intent to kill and the intent to do great bodily harm); *J&J Construction Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich

722, 731; 664 NW2d 728 (2003) (explaining that "actual malice" in the defamation context exists when the defendant knowingly makes a false statement); *Rabior v Kelley*, 194 Mich 107, 115; 160 NW 392 (1916) ("Malice, in a legal sense, means a wrongful act done intentionally, and without just cause or excuse"); see also *People v Holtshlag*, 471 Mich 1, 6, n 3; 684 NW2d 730 (2004), quoting Black's Law Dictionary (7th ed.) ("Malice is defined as: '1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart.'").[3]

The second mental state, which also constitutes "malice," is an action taken with reckless disregard for the likelihood of harm. See *Dumas*, *supra* at 396 (including within the definition of "malice," for purposes of murder, a wanton and wilful disregard of the likelihood that the natural tendency of the defendant's act is to cause death or great bodily harm); *J&J Construction Co, supra* at 731 (explaining that "actual malice" in the defamation context also exists when the defendant makes a false statement in reckless disregard of the truth); *Rabior, surpa* at 115.

Strictly speaking, "falsity" is not a part of the definition of "malice" in any context. It comes into play in defamation cases because the harm sought to be remedied by a defamation cause of action is an injurious false statement. Accordingly, the "actual malice" inquiry in the defamation context necessarily considers whether the speaker intentionally made a statement knowing it to be false (i.e., "knowingly makes a false statement") or makes a false statement with reckless disregard for the truth. Likewise, in

[3] Omitted from this Court's quotation from Black's is the additional explanation that the third definition of "malice," i.e., wickedness, is "most typical in nonlegal contexts." See Black's Law Dictionary (7th ed.), p 968.

the murder context, where the substantive harm at issue is the victim's death, the malice inquiry asks whether the actor intended to kill or acted with wanton and wilful disregard for the victim's life. In both cases, "malice" refers to the mens rea of intent to cause, or reckless disregard for the likely result, of the particular harm in question. Falsity is no more a necessary element of malice than is killing.

In the context of a civil rights claim, the harm sought to be remedied is discrimination. Thus, the malice inquiry would be whether the defendant intended to discriminate or acted with reckless disregard for the likelihood of discrimination. Because all discrimination claims under the Civil Rights Act ("CRA"), MCL 37.2101 et seq., require proof of *intentional discrimination*, see *Hazle v Ford Motor Co*, 464 Mich. 456, 628 NW2d 515 (2001); *Lytle v Malady*, 456 Mich 1, 31; 566 NW2d 582 (1997), a person liable for unlawful discrimination under the CRA necessarily has acted with "malice." Accordingly, a plaintiff alleging a civil rights violation should be permitted to proceed notwithstanding the immunity otherwise available to private hospitals under MCL 331.531. Moreover, because "disparate impact" discrimination claims also require "intent" (which, most likely, would be intent of an institutional nature), see *Lytle v Malady (on rehearing)*, 458 Mich 153, 178; 579 NW2d 906 (1998), they too would not be barred by MCL 331.531.

Osteopathic physicians are especially interested in these principles because of MCL 333.21513(e), which provides that a hospital "shall not discriminate in the selection and appointment of individuals to the physician staff of the hospital or its training programs on the basis of licensure or registration or professional education as doctors of medicine, osteopathic medicine and surgery, or podiatry." The MOA believes that acts of

discrimination against osteopathic physicians in hospital staffing decisions are outside the scope of a review entity's function, constitute malice, and are not protected by the immunity afforded to hospitals under MCL 331.531. The principle that violations of the civil rights of a person constitute malice, in addition to being well founded in Michigan law, is also embodied in the federal Health Care Quality Improvement Act ("HCQIA"), 42 USC § 11101, *et seq.*, more fully discussed below, which contains a specific exception from its immunity provisions for acts constituting the violation of the civil rights of any person.

E. *Bylaw Violations and the Scope of the Review Entity's Review Function*

The MOA believes that a claim based on a hospital's violation if its own bylaw provisions for procedural due process is a claim based on an act outside of the scope of the review entity's review function, see MCL 331.531(3)(b).

Most, if not all, hospitals have, through their bylaws, adopted procedural safeguards applicable to medical staffing decisions, including such fundamental rights as the right to adequate notice, the right to present and confront witnesses, the right to discover and present documentary evidence, the right to counsel, and the right to an unbiased hearing panel. These kinds of bylaw provisions are consistent with the mandates of the HCQIA. This HCQIA is very instructive in its legislative scheme and the policy it embodies. The MOA also believes the HCQIA is consistent with the policy of MCL 331.531 and the decision of the Court of Appeals in this case. The HCQIA provides for immunity in peer review activities, *with the exception of activities in violation of a person's civil rights*, provided the peer review body (i.e. the hospital) conducts itself in accordance with standards set forth in the HCQIA. These standards

require, among other things, that a hospital accord the affected practitioner the fundamental safeguards of procedural due process, as specifically set forth in the HCQIA. These standards are very important because they provide fundamental safeguards against arbitrary and capricious treatment. The MOA believes that actions by a hospital that violate it own bylaw mandated procedural due process rules necessarily would be outside the scope of peer review activity and, hence, would be subject to review by a court. Of course, courts are particularly well equipped to review issues of procedural due process.

F. *The MOA Agrees with Defendants' Argument that the Medical Staff Executive Committee was a Review Entity*

Lastly, the MOA expressly agrees with, and incorporates, Defendants argument III. In virtually all hospitals, the very nature of the medical staff executive committee is to engage in peer review. A narrow reading of the definition of "review entity" would defeat the legislative purpose of MCL 331.531 which was to provide the protections afforded by the statute to hospitals and physicians engaged in peer review.

CONCLUSION

For the reasons stated above, the MOA urges this Court to (1) abolish the judge-made non-reviewability doctrine in favor of strict adherence to the legislative immunity scheme set forth in MCL 331.531, (2) hold that violations of a person's civil rights are actionable despite MCL 331.531 because they are outside the scope of peer review activities and necessarily involve "malice," and (3) hold that bylaw violations involving procedural due process issues necessarily occur outside of the scope of the review entity's review function. The MOA believes that a holding of this nature would promote the policy behind MCL 331.531 to encourage medical staffing decisions based upon physician competency and provide immunity in appropriate circumstances.

Respectfully submitted,

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Dated: April 12, 2006